UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

VANGUARD CAR RENTAL USA, INC.,
d/b/a NATIONAL CAR RENTAL,

Employer

and

KAMMY A. ROLDAN, Case 37-RD-420

Petitioner

and

INTERNATIONAL LONGSHORE AND WAREHOUSE
UNION, LOCAL 142, AFL-CIO,

Union

DECISION & DIRECTION OF ELECTION

The Employer operates a car rental service at two locations in Oahu; one located at 2912 Aolele at the Honolulu International Airport and one located at 1778 Ala Moana Boulevard in Waikiki. The Employer and International Longshore and Warehouse Union, Local 142, AFL-CIO (the Union) have had a collective-bargaining relationship for several years. The most recent collective-bargaining agreement between the Employer and the Union was effective from May 5, 2003, to and including October 1, 2004 (the Agreement). By petition filed on October 22, 2007, Petitioner seeks to decertify the Union in the following bargaining unit, which is coextensive with the unit covered by the Agreement and which the parties have stipulated is an appropriate unit:

> All full-time, part-time and casual rental agents, service agents, bus operators, mechanics, key box operators, shuttlers, handheld and mechanics helpers employed on Oahu only; excluding all managerial/supervisory, professional and confidential employees, office clerical employees, temporary help and guards/security personnel as defined by the Act.

The Union seeks dismissal of the petition based on its view that Petitioner Kammy Roldan is a statutory supervisor. [1] The Employer and Petitioner take a contrary view. For the reasons discussed below, I find that Petitioner Kammy Roldan (Roldan) is an employee within the meaning of Section 2(3) of the Act, and I am directing an election in the existing unit.

I. FACTS

The Employer employs approximately 70 bargaining unit employees at its two Oahu locations; approximately 50 of whom work at Honolulu International Airport (the Airport), including Petitioner Roldan. Roldan is one of approximately twelve rental agents who are assigned to work at the Employer's five rental counters in the Airport and its lone kiosk across the street from the Airport. Roldan began working for the Employer as a key box agent in 2006, but became a rental agent in about October 2007.

During all relevant time periods, including October 2007, when the petition herein was filed, Roldan worked the main rental counter at the "quick turnaround" building ("QTA").[2] The main rental counter is open from 5:30 a.m. to 12:00 a.m., and at least one of the following three managers is on duty to supervise the counter during these hours of operation: Operations

[1] At the April 18, 2008 hearing, the Union also identified a potential contract bar to the petition, but subsequently withdrew that argument in its Post Hearing Memorandum.

[2] The QTA is the locus of rental activity. The rental cars are cleaned at the QTA and, irrespective of the counter at which a customer's contract is processed, all customers must visit the QTA to collect the keys and the rental car from the key box agent and to return the rental car and keys. Additionally, all executive customers who use express service do so at the emerald tent, which is located immediately behind the QTA.

Manager Hari Prakoso; Station Manager Carol Castanares; and/or Station Manager Michelle Molina. The Employer staggers the shifts of the rental agents to cover these extended hours of operation, and Roldan testified that, throughout October 2007, she worked varying shifts, including the closing shift. Roldan further testified that Castanares and/or Molina were always present to supervise the rental agents during all shifts. Roldan testified that she never substituted for any supervisor and she never was assigned to supervise any other employee.

Roldan, like the other rental agents, is responsible for processing customers' rental agreements. If a customer experiences a problem related to the rental agreement, the rental agent is expected to attempt to resolve the problem without assistance. In the event a rental agent is unsuccessful in this regard, the other rental agents on duty intervene in the spirit of teamwork. Roldan testified that rental agents "help out each other" and that, at the request of other rental agents and to the extent she was able, she has aided her coworkers in resolving customer problems in the past. When the roles were reversed, fellow rental agents similarly have assisted her. However, if this team approach fails, the rental agents solicit the help of a supervisor to remedy the problem.

Roldan testified that she never has been involved in any hiring or firing decisions. Nor has she ever disciplined an employee or effectively recommended that any employee receive discipline. The record does not show that Roldan ever transferred, scheduled, rewarded, laid off, recalled, evaluated, or promoted other employees, or effectively recommended such action. Roldan does not direct or assign work to employees, and no employees report to her. Roldan has never adjusted employee grievances or otherwise participated in the Employer's labor relations. Finally, Roldan denies that she has ever granted time off to an employee. On the unusual occasion when a manager was not immediately available and an employee called in sick, Roldan

acted as a conduit through whom the employees' requests and management's decision were transmitted.[3] However, Roldan never participated in a decision to deny or approve an employee's request for time off.

Roldan, like the other rental agents, is paid on an hourly basis, while the managerial employees are paid a salary. In addition to receiving an hourly wage, rental agents receive a percentage of any service upgrades they sell in the form of "incentive pay." Supervisors do not receive incentive pay but, rather, issue incentive pay to the rental agents based on the agents' sales performance. While Roldan has received incentive pay for completing sales, there is no evidence that Roldan ever granted incentive pay to another employee.

Supervisors enjoy the free use of company rental cars and the benefit of parking their personal vehicles on the Employer's premises, while bargaining unit employees do not.[4] Roldan testified that she does not receive any of these benefits and denied that the Employer ever made an exception on her behalf. While the record does not indicate where employees are expected to park, Bus Driver Norman Tachibana testified that employees are not authorized to park on the Employer's premises—including in the area reserved for bus parking. Tachibana also testified that, on one occasion around February 2008, he observed Roldan's personal vehicle parked in the area reserved for bus parking. According to Tachibana, when he confronted Roldan about her improperly parked vehicle, she assured him that she would park it elsewhere. Tachibana readily testified that he had similar experiences with other bargaining unit employees contravening the

[3] Roldan alluded to, but did not cite examples of, other rental agents similarly acting as messengers.

[4] While employees are not permitted the use of company vehicles free of charge, the record does not show that unit employees are precluded from paying to rent company vehicles.

Employer's parking policy.[5] The record does not reflect that the Employer knew of or condoned Roland parking her personal vehicle in the bus parking area or anywhere else where unit employees are not entitled to park.

Union Business Agent Shane Ambrose testified to receiving reports from employees that, prior to leaving work to file the instant petition on October 22, 2007, Roldan was "in a meeting" and, when she left, she was still on the clock. According to Ambrose, other employees told him that Roldan proceeded to the Employer's service lane and drove away in a mid-size vehicle. While Ambrose readily avers that he did not witness any of these events, and none of the employees who reported them to Ambrose were called to testify, Roldan specifically denied the reports and asserted that she clocked off around 2:00 p.m. on October 22, 2007, prior to leaving work to file the instant petition in the Board's Region 37 office. Although Roldan admitted that she drove a company rental car at unspecified times that day, she testified that she previously paid for the rental car with her personal credit card. Roldan denies that the Employer granted her free use of its rental cars, and the record is devoid of evidence that it otherwise conferred on her any rental benefit to which other rental agents would not be not be entitled.

II. ANALYSIS

As indicated above, the Union contends that Petitioner Roldan is a statutory supervisor, warranting dismissal of the instant petition, while Roldan and the Employer take the opposite position and seek the direction of an election in the existing unit. On the basis of the foregoing

[5] Tachibana vaguely referred to Roldan and other unit employees violating the Employer's parking policy on other unspecified dates between April 2007 and April 2008, but did not articulate the details of those asserted violations. Roland also testified that other employees violate the parking policy. There is no evidence that the Employer has disciplined an employee for impermissibly parking on its premises.

and the record as a whole, I find that Roldan is not a statutory supervisor; rather, she is a rank-and-file rental agent within the bargaining unit.

The sole issue in this case is whether Roldan is a "supervisor," which is defined by Section 2(11) of the Act as:

> [A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

As the Board stated in *Oakwood Healthcare, Inc*., 348 NLRB No. 37 (September 29, 2006) slip op at 2:

> Pursuant to this definition, individuals are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., "assign" and "responsibly to direct") listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of "independent judgment;" and (3) their authority is held "in the interest of the employer." (footnote omitted) Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same. The burden to prove supervisory authority is on the party asserting it.

In *Oakwood*, the Board further observed that the term supervisor was not intended to include "straw bosses, lead men, and set-up men," who are protected by the Act even though they perform "minor supervisory duties." *Id*. slip op at 2, citing *NLRB v. Bell Aerospace Co*., 416 U.S. 267, 280-281 (1974). Rather, the putative supervisor must exercise "genuine management prerogatives," identified as the twelve supervisory functions listed in Section 2(11) of the Act. If the putative supervisor has the authority to exercise or effectively recommend the exercise of at least one of these twelve functions listed in Section 2(11), he or she is a statutory supervisor,

provided that the authority is held in the interest of the employer and is exercised neither routinely nor in a clerical fashion, but with independent judgment. *Id.*

I have carefully considered the record under the application of the foregoing principles and I find that the Union has not carried its burden to establish that Roldan is a statutory supervisor.[6] Succinctly stated, the record evidence does not establish that Roldan has exercised any of the supervisory authority encompassed by Section 2(11) of the Act.[7] There is no evidence that Roldan, with a mere six months of experience under her belt as a rental agent, has assigned or responsibly directed other employees, or that she has been held accountable for her co-workers' work performance. While Roldan has obliged other rental agents by assisting in the resolution of customer problems, the record indicates that other, more senior rental agents reciprocate in the spirit of teamwork. In this context, the Employer has bestowed on all rental agents the authority to resolve customer complaints, and any limited guidance or assistance that Roldan provided was returned in kind by her fellow rental agents. Routine guidance and assistance from one employee to another does not satisfy the supervisory indicia enumerated in Section 2(11) of the Act, and the assistance provided by Roldan never ripened into the "direction of employees" contemplated by the Board to support a finding of supervisory status. *Oakwood*, supra; *Arlington Elec., Inc.,* 332 NLRB 74 (2000); *Daniel's Pallet Service*, 283 NLRB 34 (1987).

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[6] The burden rests with the party seeking to exclude otherwise eligible employees from the coverage of the Act. *Goodwill Industries of North Georgia, Inc*., 350 NLRB No. 5 (2007) citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712 (2001).

[7] When examined by Union counsel and the Hearing Officer, Roldan credibly denied exercising any of the supervisory authority specified in Section 2(11) of the Act. There is no evidence in the record that serves to disturb Roland's denials. Furthermore, to the extent that any of Union Business Agent Shane Ambrose's testimony is at odds with Roland's regarding hypothetical secondary supervisory indicia, it is hearsay based on reports he received from unidentified employees who were not called to testify. Roland's unassailable first-hand testimony is the best evidence.

Additionally, although Roldan may occasionally have relayed messages when employees called in sick, she was primarily engaged in the daily performance of bargaining unit work. On those rare circumstances when Roldan acted as a messenger, Roldan credibly testified that she never participated in management's decisions to approve or deny employees' requests for time off work. The Board has long held that employees who are mere conduits for communicating information between management and other employees are not statutory supervisors. *Dynamic Science, Inc*., 334 NLRB 391 (2001); *Bowne of Houston*, 280 NLRB 1222, 1224 (1986); *Reeves Wedman Company*, 203 NLRB 850 (1973).

In this vein, even if Roldan's limited and sporadic role as a conduit were misconstrued to suggest that she acts as a substitute for ambulatory supervisors, it would likewise prove deficient as a basis for finding Roldan to be a Section 2(11) supervisor. See *Carlisle Engineered Products, Inc*., 330 NLRB 1359 (2000) ("[E]ven assuming that the processors exercise statutory supervisory authority when substituting, we find that this occasional assumption of supervisory duties is too insubstantial to transform what are otherwise rank-and-file employees into statutory supervisors") citing *Quality Chemical, Inc*., 324 NLRB 328, 331 (1997). The appropriate test for determining the status of employees who substitute for supervisors is "whether they spend a regular and substantial portion of their working time performing supervisory tasks." *Id.* Accordingly, even if Roldan did exercise supervisory authority during these intermittent and brief interludes, the record discloses that Roland does not spend a regular and substantial portion of her working time acting in this capacity. *Carlisle Engineered Products, Inc.,* supra.

Further, although the record contains ambiguous evidence of Roldan surreptitiously enjoying a parking perk reserved for management, such evidence is insufficient to establish Roldan as a statutory supervisor. While Roldan might have violated the Employer's parking

policy on one or more occasions by parking in the bus parking area, any violation of the policy appears to have been isolated and there is no evidence that the Employer knew of Roldan's transgressions or that she did so with the Employer's imprimatur. Moreover, Tachibana and Roldan testified that other unit employees likewise violate the policy with impunity.

Finally, Roldan candidly testified that she rented and paid for a company vehicle for her personal use on the day that she filed the instant petition. The record does not show that the Employer denies its employees the public right to avail themselves of its rental services.[8] More to the point, there is no evidence that the Employer ever extended to Roldan the use of a company rental car free of charge as a management benefit.

In light of the above, I conclude that Roland does not exercise of any of the supervisory authority set forth in Section 2(11) of the Act. This is not a borderline case where the evidence is inconclusive as to, among other criteria, whether Roldan uses independent judgment in assigning and/or directing other employees. Moreover, even assuming, without finding, that Roland possesses certain secondary indicia of supervisory status, they would be insufficient to support a finding that Roldan is a supervisor within the meaning of Section 2(11) of the Act. See *Wilshire At Lakewood*, 343 NLRB 141 (2004); *Ken-Crest Services* 335 NLRB 777 (2001) ["When there is no evidence presented that an individual possesses any one of the several primary indicia of statutory supervisory status enumerated in Section 2(11) of the Act, secondary indicia are insufficient by themselves to establish supervisory status."]

[8] I note that, even if the Employer had made an exception by allowing Roland to rent one of its vehicles, it would not elevate her status as a unit employee to that of a statutory supervisor. I also recognize that, even if Roldan left work early without clocking out (a benefit reserved for management), it would likewise fall short of showing her to be a Section 2(11) supervisor.

III. CONCLUSIONS AND FINDINGS

Based upon the entire record, I conclude and find, as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is an employer as defined in Section 2(2) of the Act and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated, and I find, that the Union is a labor organization within the meaning of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time, part-time and casual rental agents, service agents, bus operators, mechanics, key box operators, shuttlers, handheld and mechanics helpers employed on Oahu only; excluding all managerial/supervisory, professional and confidential employees, office clerical employees, temporary help and guards/security personnel as defined by the Act.

6. Kammy Roldan is not a supervisor within the meaning of Section 2(11) of the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote on whether they wish

to be represented for purposes of collective bargaining by International Longshore and Warehouse Union, Local 142, AFL-CIO. The date, time and place of the election will be specified in the notice of election that will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior*

Underwear, Inc., 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **June 25, 2008.** No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, **www.nlrb.gov,**[9] by mail, or by facsimile transmission at (808)541-2818. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

[9] To file the list electronically, go to **www.nlrb.gov** and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the "Accept" button. The user then completes a form with information such as the case name and number, attaches the document containing the election eligibility list, and clicks the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlrb.gov.

Because the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Service*s, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in **Washington** by **July 2, 2008.** The request may be filed electronically through E-Gov on the Board's web site, **www.nlrb.gov** ,[10] but may not be filed by facsimile.

[10] Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**.

DATED at San Francisco, California, this 18th day of June 2008.

/s/ *Joseph P. Norelli*

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